1987

State of Utah v. Lonnie L. Moore : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent.	:	Case No. 870470
	:	
vs.	:	
	:	
LONNIE L. MOORE,	:	Priority 2
	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF DISTRIBUTION OF A CONTROLLED SUBSTANCE FOR VALUE WITHIN 1,000 FEET OF A SCHOOL, A FIRST DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii) (SUPP. 1987), IN THE SEVENTH JUDICIAL DISTRICT COURT, IN AND FOR GRAND COUNTY, STATE OF UTAH, THE HONORABLE BOYD BUNNELL, JUDGE, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES AND RULES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent.	:	Case No. 870470
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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of Distribution of a Controlled Substance in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1987) after a trial in the Seventh District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(3)(h) (1987).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the trial court erred in failing to submit to the jury, in addition to the given lesser included offense instruction, additional lesser included offense instructions offered by defendant.

2. Whether the court should have found, as a matter of law, that defendant was entrapped.

3. Whether Utah Code Ann. § 58-37-8(5) violates the due process clauses of the United States and Utah Constitutions

by imposing an enhanced penalty for violations taking place within 1,000 feet of a school.

4. Whether the application of Utah Code Ann. § 58-37-8(5) to defendant, a small town drug dealer, violates the equal protection clauses of the United States and Utah Constitutions.

5. Whether Utah Code. Ann. § 58-37-8(5)(d) violates the due process clause of the United States and Utah Constitutions by precluding as a defense lack of knowledge about the proximity of a school.

Constitutional Provisions, Statutes and Rules

Constitution of the United States, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Utah, Art. I § 7:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Ann. § 58-37-8.

(1) Prohibited acts A --Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

...

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance:

...

(b) Any person who violates Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is, upon conviction, guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classifed [sic] in Schedule III or IV, or marihuana is, upon conviction, guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is, upon conviction, guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.

...

(5) Prohibited act E --Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Chapter 3a, Title 58, the Drug Paraphernalia Act, or under Chapter 37b, Title 58, the Imitation Controlled Substances Act, shall, upon conviction, be subjected to the penalties and

classifications under Subsection (5) (b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school under Subsection (5)(a)(i);

(iii) within 1,000 feet of any structure, facility, or grounds included in Subsection (5)(a)(i) or (ii); or

(iv) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, nor may the person be eligible for parole until the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense, or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

Utah Code Ann. § 76-2-101.

No person is guilty of an offense unless his conduct is prohibited by law and:

(1) He acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the

statute defining the offense, as the definition of the offense requires; or
(2) *His acts constitute an offense* involving strict liability.
These standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, unless specifically provided by law.

STATEMENT OF THE CASE

This is an appeal from a conviction of distributing a controlled substance for value, a first degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1987). Defendant was found guilty on November 13, 1987, after a jury trial in the Seventh Judicial District Court, in and for Grand County, State of Utah, the Honorable Boyd Bunnell, Judge, presiding.

STATEMENT OF FACTS

On September 16, 1986, Detective Kelly met with police informer Daniel Ward in connection with the latter's aid in the location and arrest of drug offenders (T. 47-48). At approximately 6:00 p.m. on that same day, Mr. Ward introduced Detective Kelly, to "Blue," a man who was later identified as defendant (T. 48A, 52). Mr. Ward's decision to name defendant was motivated by the fact that defendant had offered to obtain a "quantity" of drugs for him earlier that day (T. 130).

Defendant invited Detective Kelly and Mr. Ward into defendant's residence where, after some small talk, Mr. Ward told defendant that they wanted to obtain "an eighth of a crystal" of "crack" (methamphetamine) (T. 48A, 53). For that purpose, Ward and Kelly gave defendant $275, the amount necessary to obtain the drug (T. 53). After an unsuccessful attempt to obtain the

methamphetamine, defendant offered to try to obtain cocaine (T. 54, 67). Unable to obtain cocaine at that time, defendant then offered to keep the money and try again the next day to obtain the methamphetamine (T. 55, 68).

On the following day, defendant obtained and delivered a bindle of methamphetamine to Mr. Ward, in the presence of Det. Kelly (T. 57, 60, 107). At that time, defendant asked Mr. Ward to "cut him a line" from the bindle as the prearranged payment for obtaining the drugs (T. 57-58, 70). Defendant told Ward and Kelly they could come back again for more drugs (T. 59).

Defendant's residence is near the Grand County Middle School (T. 82-87). On one approach it is 482'7" from the school yard (T. 82) and on another it is 568'7" (T. 83).

SUMMARY OF ARGUMENT

1. The trial court properly instructed the jury on the lesser included offense: distribution of a controlled substance without value. Defendant is not entitled to repetitive instructions and therefore, the court correctly refused to include defendant's other requested instructions.

Moreover, defendant's additional instructions would not have altered the outcome of the trial. The evidence shows that defendant received value for his services. Therefore, the court did not commit reversible error.

2. There was sufficient evidence at trial to find beyond a reasonable doubt that defendant was not entrapped. Defendant was not pressured into obtaining the drugs, but his acts were spontaneous and voluntary.

In addition, the informant's relationship with defendant was purely a "business" one and not the type of relationship which suggests improper inducement or extreme pleas based upon an intimate friendship. Therefore, defendant was not entitled to a finding of entrapment as a matter of law.

3. Defendant was not denied due process or equal protection by the statutory enhancement of his crime for sale of drugs within 1000 feet of school property without regard to defendant's knowledge that he was located near the school. The statute does not create an irrebuttable presumption of such knowledge, rather it holds defendant strictly liable for his acts committed near a school.

Nor does the statute unconstitutionally treat defendant differently than large town drug dealers merely because it is possible that a greater number of drug sales in small towns might occur within the 1000 foot radius than in large towns. Even if the statute does affect a proportionately larger percentage of small town dealers more harshly, such a result is not constitutionally prohibited since small town drug dealers enjoy no special protection for their status as such.

4. The strict liability sentence enhancement provision for sale of drugs near a school does not violate due process by eliminating the mens rea for the criminal act of selling drugs or eliminating the State's burden of proof. The drug sale must still be intentional or knowing and the State must prove that the sale occurred within 1000 feet of school property beyond a reasonable doubt. That the State is not statutorily required to

establish defendant's knowledge of his location is not a constitutional violation.

POINT I

THE TRIAL COURT PROPERLY AND ADEQUATELY INSTRUCTED THE JURY ON THE LESSER INCLUDED OFFENSE OF DISTRIBUTION OF A CONTROLLED SUBSTANCE WITHOUT VALUE.

Pursuant to defendant's requested instruction No. 3, the trial court instructed the jury on distribution of a controlled substance without value as a lesser included offense of the crime charged (See Jury Instruction No. 6) (R. 63). In fact, the court's jury instruction was defendant's requested instruction, verbatim (R. 55, 63). In addition, the trial court instructed the jury that

> In construing and interpreting these instructions, the following definitions shall apply ... The meaning of the term "distribute for value" means to deliver a controlled substance in exchange for compensation, consideration, or item of value, or a promise therefore [sic].

Jury Instruction No. 5 (R. 62).

On appeal, defendant argues that the trial court erred in denying two of his requested instructions, apparently ignoring the fact that the court did give the aforementioned lesser included offense instruction. While a defendant is entitled to an instruction on his or her theory of the case, State v. McCumber, 622 P.2d 353, 359 (Utah 1980), the defendant is not entitled to multiple instructions setting forth the same theory of the case. State v. Miller, 727 P.2d 203 (Utah 1986).

Defendant requested that the court, in addition to defining what distribution for value is, define what it is not.

Such an instruction was unnecessary where the given instructions adequately defined the offense. The court should not be required to instruct the jury on every fact scenario that could be eliminated from the charged offense along with those that constitute the offense.

Nor is there prejudicial error if the giving of a party's requested instructions would not have affected the outcome of the trial. State v. McCumber, 622 P.2d 353, 359 (Utah 1980). In the instant case, the trial court properly gave defendant's instructions on the lesser-included offense along with a clarifying additional instruction. Defendant's additional requested instruction, at most, attempted similar clarification by exclusion rather inclusion. Since the trial court provided adequate instructions defining the offense, defendant was not entitled to his requested instructions No. 1 and No. 2.

In addition, the outcome of the trial would not have been affected by defendant's requested instructions because the evidence clearly shows that defendant distributed the controlled substance in exchange for a "line." At trial one of the undercover detectives testified as follows:

> Q. Why did he cut a line?
>
> A. It had been pre-arranged by the defendant that he wanted a line for obtaining the controlled substance for us; and as he delivered it, he indicated he wanted a line for getting the controlled substance for us. (T. 58) (see also T. 136, 141).

It is irrelevant that, as defendant argues, defendant "cut a line" only after he delivered the substance. The facts in this case do not support defendant's contention that all the officer

did was "share" the drugs with a friend rather than pay defendant with the "line."

Defendant's reliance on State v. Ontiveros, 674 P.2d 103 (1983) is misplaced. In that case, not only was there no pre-arranged "payment" to the defendant for obtaining the drugs, but the defendant's agency was clearly established by the fact that he attempted to buy part of the drugs from the undercover officer. Defendant also fails to distinguish State v. Udell, 728 P.2d 188 (1986) from the instant case. Like in that case, defendant in the instant case took the money and left in search of the drugs (T. 53, 67-68). It makes no difference whether the defendant profited from the transaction or not. Id. at 134. In fact, the instant case suggests more strongly than Udell that defendant received value for the substance given the existence of the pre-arrangement in the instant case, which was missing in Udell. Given the overwhelming evidence showing that defendant received value for delivery of the controlled substance, it is unlikely that the jury would have convicted defendant of the lesser included offense even if defendant's other two instructions had been given. Further, because the court's instructions properly and adequately informed the jury of the lesser included offense and defined the acts necessary to establish the "for value" prong of the offense, the court's denial of defendant's requested instructions was not error.

POINT II

THE JURY'S FINDING BEYOND REASONABLE DOUBT THAT DEFENDANT WAS NOT ENTRAPPED IS AMPLY SUPPORTED BY THE EVIDENCE.

At trial, defendant raised the issue of entrapment based on two different grounds. First, defendant moved to dismiss the case alleging that the police agents had no knowledge of defendant's drug-related activities prior to the investigation (R. 5-10). The court denied this motion (R. 10). Subsequently, defendant testified in support of his entrapment defense that Dan Ward was his close friend (T. 122). Defense counsel emphasized this point in closing argument (T. 168). On appeal, defendant pursues only the latter theory of his entrapment defense; that the evidence establishes the entrapment defense as a matter of law, based on his alleged friendship with the police informant.

In State v. Taylor, 599 P.2d 496 (Utah 1979), this Court set forth the standard to establish the entrapment defense as follows:

> [T]he test to determine an unlawful entrapment is whether a law enforcement official or an agent, in order to obtain evidence of the commission of an offense, induced the defendant to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who was merely given the opportunity to commit the offense.

Id. at 503 (emphasis added).

In State v. Salmon, 612 P.2d 366, 369 (Utah 1980), this Court established the standard of review of jury decisions on the entrapment defense:

> Where there is a reasonable basis in the evidence upon which jurors could believe beyond a reasonable doubt that the crime was a result of a defendant's own voluntary desire and intent to commit the crime, the fact that a police officer merely afforded him the opportunity to commit it, does not amount to entrapment. (Citation omitted.)

The trial court instructed the jury on the entrapment defense, consistent with Utah Code Ann. § 76-2-303 (1978) and this Court's decisions based on that statute, as set forth above (T. 154-5). Nevertheless, the jury found defendant guilty as charged (T. 173-4).

The evidence introduced at trial provided a reasonable basis upon which the jury could find beyond a reasonable doubt that defendant was merely given an opportunity to voluntarily commit the crime. The State introduced evidence that defendant's participation was not the product of persuasion or inducement on the part of either the undercover agent or the informant, but a purely voluntary act. There was evidence presented at trial that defendant was a regular supplier of drugs for the informant (T. 130-131, 139-140).

Further, defendant actively participated in the initiative to obtain drugs for the undercover agent and the informant. Before the informant met with the undercover agents, defendant offered him drugs "in quantity" (T. 130). In defendant's house, neither the agent nor the informant insisted upon getting the drugs, but defendant took the initiative to get them right away (T. 53). Once the initial attempt to obtain methamphetamine failed, defendant voluntarily offered to obtain cocaine (T. 54). Finally, failing to obtain the substance for

the second time, defendant spontaneously requested to keep the money overnight to make a further attempt during the next day (T. 55). This evidence supports the jury's finding that defendant's actions were voluntary and not the product of improper persuasion or inducement.

Defendant mistakenly relies on State v. Taylor, 599 P.2d 496 (Utah 1979), claiming that, as in that case, defendant's relationship with the informant was such that the entrapment defense was established as a matter of law. In that case, this Court stated:

> Extreme pleas of desperate illness or appeals based primarily on sympathy, pity, or close friendship, or offers of inordinate sums of money, are examples, depending on an evaluation of the circumstances in each case, of what might constitute prohibited police conduct.

Id. at 599 P.2d 496, 503 (Utah 1979). Accordingly, the Court found that Taylor was entrapped, partly based on his close, intimate relationship with the police informant.

The instant case is distinguishable from Taylor. Not only did the informant and defendant lack the sort of close friendship established in Taylor, there is evidence tending to show that their relationship was strictly that between a drug supplier and a drug buyer (T. 139-140). The jury was not required to believe defendant's self-serving contradictory testimony that he was just doing a favor for a very close friend. State v. Pierce, 722 P.2d 780, 781-82 (Utah 1986) Even so, defendant's description of the relationship did not create the type of compelling circumstance that existed in Taylor and the

jury could believe the two were friends without also finding that defendant was entrapped. Taylor does not hold that merely establishing that the accused was friendly with the informer or agent amounts to entrapment as a matter of law. Taylor contemplates the existence of much more compelling circumstances that would persuade someone to commit the crime who was not already willing, given the opportunity. For these reasons defendant was not entrapped as a matter of law.

POINT III

THE INCREASED PENALTY IMPOSED BY UTAH CODE ANN. § 58-37-8(5) IS CONSISTENT WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND UTAH CONSTITUTIONS.

Defendant claims that Utah Code Ann. § 58-37-8(5) (Supp. 1987), which increases the penalty for certain drug transactions that occur on, or within 1,000 feet of, a school ground, is unconstitutional. Defendant first contends that the statute violates the due process clause by creating an irrebuttable presumption that children are either witnesses to or "victims" of the drug transaction.

The subject statute does not create an irrebuttable presumption that children are present during the criminal conduct. It neither presumes nor requires the actual presence of a child during the drug transaction. Instead, the statute protects against the extreme potential for damage created by the criminal conduct when performed on or near school grounds. Dealing drugs on or near a school ground greatly increases the risk that children will be targeted as customers, thus, increasing drug use and dependency among children.

Unquestionably, the State has a compelling interest "in safeguarding the physical and psychological well-being of a minor." New York v. Ferber, 458 U.S. 755, 756-7 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)). This compelling interest sustains legislation aimed at protecting the physical and emotional well-being of children "even when the laws have operated in the sensitive area of constitutionally protected rights." Ferber, 458 U.S. at 757. In the instant case, the Legislature took measures to protect the children of Utah from the extreme potential danger created where drug transactions occur on or near a school ground. This Court should not intervene to defeat the statute's legitimate goal.

Moreover, defendant fails to show how this element of the crime violates his due process rights. Defendant cites Vlandis v. Kline, 412 U.S. 441 (1987) for the proposition that the Supreme Court disfavors irrebuttable presumptions. However, defendant fails to explain why the alleged presumptions should be disfavored in this case. Nevertheless, subsequent decisions of the Supreme Court have severely limited Vlandis. See Gorrie v. Bowen, 809 F.2d 508, 524 n. 25 (9th Cir. 1987) ("'legitimate doubt' whether anything remains of Vlandis").

In addition, this case is distinguishable from Vlandis. In that case as well as in the cases cited therein, the complaining party argued that the statute in question deprived him or her of a fundamental right without due process of law. A group of university students challenged the constitutionality of a statute in Vlandis which defined residency for purposes of

tuition in a way that denied them the opportunity to show their qualification as residents. The Court held that the statute deprived the student of property without due process.

Defendant does not argue, nor is there a basis to assert, that a similar violation has taken place here. Defendant has no fundamental right to sell drugs, let alone to sell them near school facilities. The subject statute is not determinative of guilt or innocence, nor does it enhance the offender's culpability, as defendant repeatedly suggests. As previously discussed, the statute's increased penalty is consistent with the State's legitimate interest in protecting the emotional and physical well-being of Utah's children.

Concerning the theft statute increasing the penalty for identical criminal conduct committed under special circumstances, this Court stated:

> It is not unconstitutional for a state to impose a more severe penalty for a particular type of crime than the penalty which is imposed with respect to the general category of crimes to which the special crime is related or of which it is a subcategory.

State v. Clark, 632 P.2d 841, 843 (Utah 1981) (citing Rammell v. Smith, 560 P.2d 1108 (Utah 1977)). Accordingly, in this case, the increased punishment for an offense committed under special circumstances is not unconstitutional.

Defendant also contends that Utah Code Ann. § 58-37-8(5) violates due process by failing to consider the physical circumstances of small town drug dealers. Since defendant fails to support his argument with legal analysis or case citation, this Court should not review his contention. See State v. Amicone, 689 P.2d 1341 (Utah 1984).

Finally, defendant contends that § 58-37-8(5) violates the equal protection clause of the Utah and United States Constitutions by "treat[ing] defendants in small towns differently from those in large cities." Appellant's Brief at 17. Yet, the statute's language clearly applies to all individuals who deal in drugs within 1,000 feet of school grounds, regardless of the geographic location of the school.

Apparently, what defendant attempts to argue is that, while the statute appears facially neutral, its application has the effect of treating small town dealers differently from large city dealers since he claims that in small towns the likelihood of the criminal conduct taking place within 1,000 feet of a school ground is greater, small-town drug dealers are more likely to be subject to the higher penalty imposed by the statute. Admittedly, it is possible that the statute could enhance the punishment of a greater percentage of small-town drug dealers than of their large city counterparts. However, such an effect is not constitutionally proscribed. Small town drug dealers do not fall within any specially protected group, and there is no constitutional prohibition against treating larger numbers of a non-suspect group more harshly than members of a similar group based upon their choice of residence. Given that the intent of the law has a rational relation to the State's interest in protecting its children's emotional and physical well-being, the statute does not violate equal protection in any event.

While generally, a statute may not treat those similarly situated differently, equal protection of the law

provisions do not prevent different treatment "as long as there is a reasonable basis for the difference." State v. Bishop, 717 P.2d 261, 266 (Utah 1986). In the instant case, the State has a strong legitimate interest in protecting its children from drug use and dependency. As previously discussed, drug dealing near school grounds creates an extreme potential for harm to children, in that children are likely to be targeted as "customers" or be exposed to a potentially violent criminal element of society. This potential exists in small towns and large cities alike. But most importantly, while drug dealing is more likely to take place near school grounds in a small town, the potential risk of children becoming targets is proportionately greater.

The enhanced effect of the statute in small towns is reasonable in light of the proportionately greater potential risk which the statute was designed to prevent. In turn, the establishment of safeguards to protect children from drug exposure and dependency is consistent with the State's interest in protecting its children's emotional and physical well-being. Therefore, the statute does not violate the equal protection clause.

POINT IV

UTAH CODE ANN. § 58-37-8(1)(a) SUPPLIES THE MENS REA FOR DEFENDANT'S CRIMINAL ACT, THEREFORE, HIS DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE STRICT LIABILITY SENTENCE ENHANCEMENT PROVISION.

Utah Code § 58-37-8(1)(a)(ii) makes it illegal to intentionally and knowingly distribute a controlled substance as specified therein. Utah Code Ann. § 58-37-8(5) imposes an

enhanced penalty for that offense when committed within 1,000 feet of a school ground. Utah Code Ann. § 58-37-8(5)(d) establishes that the offender's lack of knowledge about the proximity of a school is no defense. Defendant argues that the latter provision violates due process by allegedly (1) creating an irrebuttable presumption; (2) eliminating the mens rea requirement for the offense; and (3) relieving the State of its burden of proving each element of the offense beyond a reasonable doubt.

Defendant's first and last contentions presuppose that knowledge of the proximity of a school is or should be an element of the offense for which he was charged. Defendant's first contention merely repeats his due process argument in Point III of his brief. Yet, the statute neither presumes nor requires knowledge of the aggravating factor's presence as an element of the offense. Again, the absence of such a requirement is consistent with the State's legitimate interest in protecting its children's physical and emotional well-being. Since § 58-37-8(5) makes it irrelevant whether the offender knows that he or she is near a school, it does not create a presumption that he or she possesses such knowledge. Rather, sale of drugs near a school is a strict liability enhancement provision.

On the other hand, the same absence of a requirement of knowledge as to the aggravating factor's presence precludes defendant's third contention. If knowledge of that factor is not an element of the offense, the State need not prove defendant's knowledge beyond a reasonable doubt. Therefore, the statute would not violate due process on that account.

In his second contention defendant mistakenly states that § 58-37-8(5)(d) eliminates the mens rea requirement for the offense for which he was charged. Defendant was convicted of distribution of a controlled substance for value in violation of § 58-37-8(1)(a)(ii). That section requires intentional and knowing distribution as grounds for conviction. Section 58-37-8(5)(d) does not eliminate this mens rea requirement.

Section 58-37-8(5) does not create a separate offense that requires an additional mens rea. It simply enhances the penalty for an offense already defined, when the offense is committed under special circumstances. In this sense it is comparable to other statutes which establish the degree of an offense, or enhance the penalty, under special circumstances. The Utah theft statute, for example, classifies the degree of the crime according to the value of the property taken without regard to whether the actor knew of the value of the property. See Utah Code Ann. § 76-6-412 (1978). Nor does the theft statute require that the offender intend to take property valued in a particular amount for penalty purposes.

Section 58-37-8(5) is also similar to statutes which enhance the penalty imposed upon a person who kills a police officer. The constitutionality of such a statute was upheld in another jurisdiction against a similar claim in spite of the fact that the statute does not require that the offender know that the victim is a police officer. See State v. Compton, 726 P.2d 837 (N.M. 1986).

In Utah, criminal responsibility attaches when a person acts "with a mental state specified in the statute defining the offense." Utah Code Ann. § 76-2-101(1) (Supp. 1987). The law does not require that each element of the offense include a corresponding culpable mental state. Interestingly, the former Utah statue defining criminal responsibility required just that. See Utah Code Ann. § 76-2-101(1) (1978). The statute was amended in 1983, eliminating the requirement. (Compare with Utah Code Ann. § 76-2-101(1) (Supp. 1987)).

In the instant case, § 58-37-8(1)(a)(ii) defines the offense for which defendant was charged, requiring that the conduct be intentional and knowing. Section 58-37-8(5) merely enhances the penalty when an aggravating factor is present. Utah law does not require that the aggravating element be accompanied by a mens rea. Therefore, § 58-37-8(5)(d) which eliminates lack of knowledge about the aggravating factor's presence as a defense for the enhanced penalty does not violate due process.

CONCLUSION

Based upon the foregoing, the State requests this Court to affirm defendant's conviction and minimum mandatory sentence.

DATED THIS 29th DAY OF JULY, 1988.

DAVID L. WILKINSON
Attorney General

SANDRA L. SJOGREN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 29th day of July, 1988, I caused to be mailed, postage prepaid, four (4) true and exact copies of the above and foregoing Brief of Respondent to Paul W. Mortensen, 131 East 200 South, P.O. Box 339, Moab, Utah 84532.